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In the Supreme Court of the United States

OCTOBER TERM, A.D. 1968

In The Matter of **NATHAN SHAVIN**, An Attorney

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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In the Supreme Court of the United States

OCTOBER TERM, A.D. 1968

No.

In The Matter of NATHAN SHAVIN, An Attorney

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Nathan Shavin, petitioner herein, prays that a writ of certiorari be issued to review the decision of the Supreme Court of Illinois.

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Illinois (R. 17) is reproduced in Appendix I to this Petition for Certiorari. The opinion is published in the North Eastern Reporter, *In re Shavin*, 239 N.E.2nd 790.

JURISDICTION

The decision of the Supreme Court of Illinois was rendered on May 29, 1968 (R. 18). On June 19, 1968, an order was entered by the Supreme Court of Illinois on motion and stipulation granting an extension to July 19, 1968, to file a petition for rehearing. (R. 20). This petition for rehearing was filed on July 17, 1968 (R. 21) and the petition for rehearing was denied by the Supreme Court of Illinois on September 24, 1968. (R. 22)

The jurisdiction of the Supreme Court of the United States is invoked herein under Title 28 United States Code, Section 1257(3).

QUESTIONS PRESENTED

(1) Is the double jeopardy clause of the Fifth Amendment to the Constitution of the United States applicable to the States through the Fourteenth Amendment?

(2) May a State, without hearing evidence as to guilt or innocence, suspend a lawyer from the practice of law, after more than 40 years of practice, for the sole reason that he served a sentence for a Federal income tax violation?

(3) Does the additional punishment of a two-year suspension from the practice of law in the case at bar constitute double jeopardy which is prohibited by the Fifth Amendment to the Constitution of the United States?

In this connection, we call this Honorable Court's attention to the case of *Benton* v. *Maryland,* No. 1185, Misc., October Term 1967, now pending before this court, wherein this court, on June 17, 1968, entered the following order (392 U.S. 925):

"Motion for leave to proceed in forma pauperis and petition for writ of certiorari to the Court of Special Appeals of Maryland granted limited to the following questions:

"(1) Is the double jeopardy clause of the Fifth Amendment applicable to the States through the Fourteenth Amendment?

"(2) If so, was the petitioner 'twice put in jeopardy' in this case? Case transferred to the appellate docket."

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

The Fourteenth Amendment to the Constitution of the United States provides "nor shall any state deprive any person or life, liberty or property, without due process of law."

STATEMENT OF THE CASE

The Supreme Court of Illinois in its opinion, has stated the facts in the case at bar as follows (R. 17):

"The sole question presented in this disciplinary proceeding is the extent of the punishment to be imposed upon respondent [petitioner herein], Nathan Shavin, an attorney practicing in Chicago since 1926. Respondent [petitioner herein] was convicted in 1961 of knowingly filing false and fraudulent personal income tax returns for the years 1954 and 1955 in violation of section 7201 of Title 26 of the United States Code, and concurrent sentences of 18 months imprisonment were imposed on each of two counts together with fines totalling $5,000 and costs of $1,420.94. The conviction was affirmed in 1963 (*United States* v.

Shavin, (7th Cir.) 320 F.2d 308), and respondent [petitioner herein] served 12 months in the Federal penitentiary; the fines and costs were paid.

* * *

"The stipulated or admitted facts indicate respondent's [petitioner herein] practice consisted almost entirely of personal injury work for plaintiffs . . . *Very loose bookkeeping methods prevailed, and* while the amount of unreported income for the years in question was alleged by the government to be $28,104.50 and $61,063.01, *it is stipulated that there were deductible items paid out during those years which were not included in the returns. The actual amount of unreported income is claimed to be substantially less than that charged; it is as yet undetermined and the subject matter of a suit presently pending in the United States Tax Court. A number of lawyers and a judge testified that respondent's* [*petitioner herein*] *reputation for integrity and honesty was good, and it is not contended that any client was dissatisfied with the manner in which a case was handled.* Respondent [petitioner herein] underwent surgery in 1966 and subsequently suffered a heart attack necessitating some hospitalization and a period of convalescence.

"Also urged in mitigation is respondent's [petitioner herein] claim that settlement checks received from insurance companies approximately *$30,000 during each of the questioned years were never deposited or cashed by him despite the fact that respondent's* [*petitioner herein*] *normal practice was to pay from his personal funds the amount due the client, secure the client's signature upon release form and then present the signed release to the insurer in exchange for the settlement check which respondent* [*petitioner herein*] *would then endorse and deposit or cash.* . . . While seemingly well-nigh incredible, *it is stipulated that these settlement checks were apparently uncashed and undeposited.*" (Emphasis supplied)

In the State of Illinois, the Supreme Court of the State is the sole, exclusive, one and only court which has jurisdiction to license, censure, suspend or disbar lawyers. *In re Day,* 181 Ill. 73 (1899); *In the Matter of Frank,* 293 Ill. 263 (1920); *In re Anastaplo,* 3 Ill.2d 471 (1954); *In re Latimer,* 11 Ill.2d 327 (1957); *In re Anastaplo,* 18 Ill.2d 182 (1960); *In re McCallum,* 391 Ill. 400 (1945); *In re Crane,* 23 Ill.2d 398 (1961); *In re Browning,* 23 Ill.2d 483 (1962). See also *In re Summers,* 325 U.S. 561 (1945), and *In re Anastaplo,* 366 U.S. 82 (1961), where the Supreme Court of the United States reviewed rulings of the Supreme Court of Illinois in refusing applications for admission to practice law in the State of Illinois.

The constitutional issue of double jeopardy, herein involved, was raised by the petitioner in the Supreme Court of Illinois (a court of "first instance" and also a court of "last resort," as this is the only tribunal available in the State of Illinois for this proceeding) by a Petition for Rehearing (R. 21), which is reproduced in Appendix III to this Petition for Certiorari. The Supreme Court of Illinois denied the Petition for Rehearing on September 24, 1968, without opinion (R. 22).

REASONS FOR ALLOWANCE OF WRIT

THE JUDGMENT OF THE SUPREME COURT OF ILLINOIS VIOLATES THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES PROHIBITING DOUBLE JEOPARDY.

I.

FEDERAL BILL OF RIGHTS IN CRIMINAL CASES

The Fourth, Fifth, Sixth and Eighth Amendments to the Constitution of the United States guarantee procedural due proceess in criminal cases. The Supreme Court of the United States has established, through a long series of decisions rendered in recent years, that the protection of these Amendments is not limited to proceeding in the Federal Court only—as had been previously held—but applies also to prosecution of criminal cases in state courts, as shown by the following:

Fourth Amendment: search and seizure, *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Marcus* v. *Search Warrants*, 367 U.S. 717 (1961); *Berger* v. *New York*, 338 U.S. 41 (1967); *Terry* v. *Ohio*, 392 U.S. 1 (1968); *Sibron* v. *New York*, 392 U.S. 40 (1968).

Fifth Amendment: self incrimination, *Malloy* v. *Hogan*, 378 U.S. 1 (1964); *Escobedo* v. *Illinois*, 378 U.S. 478 (1964); *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Gardner* v. *Brodereick*, 392 U.S. 273 (1968); *Sanitation Men* v. *Sanitation Com.*, 392 U.S. 280 (1968).

Sixth Amendment: assistance of counsel, *Gideon* v. *Wainwright*, 372 U.S. 355 (1963); *Douglas* v. *California*, 372 U.S. 353 (1963); *Escobedo* v. *Illinois*, 378 U.S. 478 (1964);

Miranda v. *Arizona*, 384 U.S. 436 (1966); *Milani* v. *Illinois*, 386 U.S. 12 (1967); *Swenson* v. *Bosler*, 386 U.S. 258 (1967); *Anders* v. *California*, 386 U.S. 738 (1967); *Entsminger* v. *Iowa*, 386 U.S. 748 (1967); *Gilbert* v. *California*, 388 U.S. 263 (1967); *Hemphill* v. *Illinois*, 388 U.S. 465 (1967); *Mempa* v. *Rhay*, 389 U.S. 128 (1967); speedy trial, *Klopfer* v. *North Carolina*, 385 U.S. 213 (1967); compulsory process for obtaining witnesses, *Washington* v. *Texas*, 388 U.S. 14 (1967); confrontation with witnesses, *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Douglas* v. *Alabama*, 380 U.S. 415 (1965); *Smith* v. *Illinois*, 390 U.S. 129 (1968); *Barber* v. *Page*, 390 U.S. 719 (1968); *Roberts* v. *Russell*, 392 U.S. 293 (1968); trial by jury in criminal cases which do not fall within the category of "petty" offenses, *Duncan* v. *Louisiana*, 391 U.S. 145 (1968); *Bloom* v. *Illinois*, 391 U.S. 194 (1968); *Dyke* v. *Taylor Implement Co.*, 391 U.S. 216 (1968); trial by an "impartial jury," *Parker* v. *Gladden*, 385 U.S. 363 (1966); *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968).

Eighth Amendment: cruel and unusual punishment, *Robinson* v. *California*, 370 U.S. 660 (1962).

At this far advanced developmental stage of the law, no reason seems to exist why the double jeopardy provision of the Fifth Amendment should not (like all the other provisions of the Fifth Amendment) be applicable to the States.

Recently, the Supreme Court of the United States rendered a number of important decisions which must awaken the legal profession to the realization that the differencee between "civil" and "criminal" cannot rest on arbitrary labeling by courts and legislatures, but requires careful examination of legal consequences to distinguish reality from fiction. The Supreme Court of the United States made it clear that a "State cannot foreclose the exercise of constitutional rights by mere labels." *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 429 (1963).

II.

PROCEEDINGS FORMERLY "CIVIL" ARE NOW "CRIMINAL"

1. *Juvenile Delinquency*

A proceeding against a juvenile delinquent was held by the Arizona state court to be "civil." But, in the case of *In re Gault,* 387 U.S. 1 (1967), the Supreme Court of the United States reversed the Arizona decision and held that it was a "criminal case" protected by the Federal Constitution. The Court pointed out that "proceedings to determine 'deliquency', which may lead to commitment to a state institution must be regarded as 'criminal' for purposes of the" federal constitutional guarantees (387 U.S. at 49). The Court accented that "commitment is a deprivation of liberty. It is incarceration against one's will." (387 U.S. at 50).

In the case of *In re Whittington,* 391 U.S. 341 (1968), the Supreme Court said at page 344: "In *Gault,* this Court held squarely, for the first time, that various of the federal constitutional guaranteees accompanying ordinary criminal proceedings were applicable to state juvenile court proceedings where possible commitment to a state institution was involved. * * * The judgment is vacated and the case is remanded to the Ohio Court of Appeals of Fairfield County for consideration in light of *In re Gault,* 387 U.S. 1 (1967)."

2. *Sex Offenses*

A proceeding under the Colorado Sex Offenders Act was treated by the Colorado State Court as a "civil" proceeding In *Specht* v. *Patterson,* 386 U.S. 605 (1967), the Supreme Court of the United States reversed the Supreme Court of Colorado and held that a proceeding against a

person with sexually aggressive tendencies is a "criminal case" protected by the Federal Constitution, as the deprivation of liberty by confinement "is criminal punishment even though it is to keep individuals from inflicting future harm". (386 U.S. at 608-609).

3. *Revocation of Probation*

Prior to 1967, a proceeding for the revocation of probation was held to be "civil". In *Mempa* v. *Rhay,* 389 U.S. 128, decided on November 13, 1967, the Supreme Court of the United States held that, in a proceeding to revoke probation, the defendant has a right to assistance of counsel under the Sixth Amendment to the Constitution of the United States. Thus, the Supreme Court determined that revocation of probation is a "criminal", not a "civil", proceeding.

4. *Forfeiture Proceeding*

Prior to 1965, a proceeding for the forfeiture, destruction, disposition or recovery of property seized or confiscated as contraband was considered as "civil". In *Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693 (1965), the Supreme Court of the United States held that the Fedal constitutional guarantee against unreasonable searches and seizures applied to States forfeiture proceedings (380 U. S. at 696). The Supreme Court reversed a Pennsylvania decision "in a forfeiture proceeding which the Pennsylvania court deemed civil in nature" (380 U.S. at 695). The Supreme Court held that the "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal." (380 U.S. at 697). "Its object, like a criminal proceeding, is to penalize for the commisison of an offense against the law" (380 U.S. at 700). "In this forfeiture

proceeding he was subject to the loss of his automobile, which at the time involved had an estimated value of approximately $1000, a higher amount than the maximum fine in the criminal proceeding. It would be anomalous indeed, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible. That the forfeiture is clearly a penalty for the criminal offense and can result in even greater punishment than the criminal prosecution has in fact been recognized by the Pennsylvania courts" (380 U.S. at 701).

5. *Municipal Ordinance Violation*

The Supreme Court of the United States held that, as a matter of Federal constitutional law, a prosecution under a municipal ordinance is a "*criminal*" case, as follows:

A. In *Camara* v. *Municipal Court of the City and County of San Francisco,* 387 U.S. 523, decided June 5, 1967, the Supreme Court of the United States held that enforcement of a municipal ordinance which may result in the imposition of a fine or imprisonment is a criminal case protected by the Federal Constitution as such. The Supreme Court of the United States overruled its earlier decisions and the California Court of Appeals which held that a city ordinance "is part of a regulatory scheme which is essentially civil rather than criminal" (387 U.S. at 528). The Supreme Court of the United States, on the contrary, said (387 U.S. at 540): "In this case, the appellant [defendant below] has been charged with a crime." The Supreme Court of the United States referred to the proceeding as one "enforced by criminal processes", by a "criminal complaint", constitutes "a criminal offense" and is "a crime, punishable by fine or even by jail sentence" (387 U.S. at 531).

B. In *See* v. *City of Seattle,* 387 U.S. 541, also decided by the Supreme Court of the United States on June 5, 1967, the defendant was fined $100.00 for the violation of a city ordinance and the fine was suspended (387 U.S. at 542). The Supreme Court of the United States reversed the conviction and, following the above-discussed *Camara* case, held that it was a criminal case protected by the Federal Constitution as such.

In *Avery* v. *Midland County,* 390 U.S. 474 (1968), the Supreme Court of the United States said: "[I]t is now beyond question that a State's political subdivisions must comply with the Fourteenth Amendment (citing in the footnote, among other cases, *See* v. *City of Seattle,* 387 U.S. 541). The actions of local government *are* the actions of the State". (390 U.S. at 480)

6. *Disciplinary Proceeding*

In *Spevack* v. *Klein,* 385 U.S. 511 (1967), a request was made that Spevack, a New York lawyer, produce his records in a disciplinary proceeding. Spevack refused to comply with this request, contending that if he produced his records, the evidence might show that he was involved in soliciting which would result in the deprivation of his right to earn a livelihood through the practice of law. In *Spevack* v. *Klein,* the Supreme Court of the United States held that depriving a lawyer of the right to practice law constitutes a "penalty" (385 U.S. at 514-515) and is, therefore, protected by the Fifth Amendment to the Constitution of the United States which provides: "No person . . . shall be compelled *in any criminal case* to be a witness against himself." To so hold, the Supreme Court of the United States had to reach the conclusion that a disciplinary proceeding, which may result in the penalty

of revocation of a license to practice a trade or profession, is a "criminal case", for otherwise there would be no occasion to apply the Fifth Amendment prohibiting self-incrimination in "*any criminal case*"[1] It is, therefore, clear that the holding of *Spevack* v. *Klein* is that a disciplinary proceeding is a "criminal case".

Since the decision of *Spevack* v. *Klein*, the Supreme Court of the United States has set aside other judgments in disciplinary proceedings, as follows:

A. In the case of *In Re Kaye*, 266 N.Y.S. 2d 69, the New York Court disbarred Louis Kaye, effective February 14, 1966. The New York Court, citing an earlier case, said at page 70:

> "Disciplinary proceedings are not criminal proceedings, and the 'refusal to testify raises the legal presumption of the truth of these facts, which must have been known to defendant, and which he failed to contradict.' "

The Supreme Court of the United States did not agree with this position and vacated the disbarment judgment against Louis Kaye and remanded the case to the New York Court

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[1] It must not be overlooked that the constitutional privilege against self-incrimination may come into play in criminal cases, civil cases, administrative hearings, congressional investigations, and proceedings of all kinds, because a self-incriminating statement which is made in a civil case or in any other proceeding may result in the disclosure of evidence either supporting criminal prosecution or leading to evidence which would support criminal prosecution of the person who makes the statement, thereby resulting in self-incrimination. In the *Spevack* case, the only ill effect on the lawyer would have been that his statement would lead to disbarment, which "is a punishment or penalty imposed on the lawyer" (*In re Ruffalo*, 390 U.S. 544 at 550, 551) and therefore "criminal" in effect.

for reconsideration in light of *Spevack* v. *Klein. Kaye* v. *Co-ordinating Committee on Discipline of Association of Bar of City of New York,* 386 U.S. 17 (1967).

B. In the case of *In Re Zuckerman,* 259 N.Y.S. 2d 963, the New York Court disbarred Landen Zuckerman, effective 30 days from March 3, 1965, because the respondent was guilty of the submission of misleading, exaggerated and false medical bills and statements covering lost time and earnings for insurance purposes, building up medical bills by referring claimants to a succession of doctors and using investigators to obtain signed retainers, to obtain statements from parties represented by attorneys and to obtain signatures on blank forms for appointment of guardians ad litem. However, the New York Court also took into consideration the fact that "respondent, Zuckerman, deliberately refused to cooperate with the court in its efforts to expose unethical practices and to determine whether he had committed any acts of professional misconduct which destroyed the character and fitness required of him as a condition to his retention of the privilege of remaining a member of the Bar." (259 N.Y.S. 2d at 964). The Supreme Court of the United States vacated the disbarment judgment and remanded the case to the New York Court for reconsideration in light of *Spevack* v. *Klein. Zuckerman* v. *Greason,* 386 U.S. 15, and rehearing denied. *Zuckerman* v. *Greason,* 386 U.S. 969 (1967).

In re Ruffalo, 390 U.S. 544 (1968), the Supreme Court of the United States said:

> "Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. * * * These are adversary proceedings of a quasi-criminal nature." (390 U.S. at 550, 551)

III.

DOUBLE JEOPARDY

Prior to 1967, it was common practice to proceed with disciplinary proceedings against lawyers who had been criminally convicted for income tax evasion. These proceedings resulted in most cases in Illinois in a suspension from the practice of law for several years. See *In re Teitlebaum,* 13 Ill. 2d 586 (1958), three year suspension; *In re Greenberg,* 21 Ill. 2d 170 (1961), two year suspension; *In re Revzan,* 33 Ill. 2d 197 (1965), two year suspension; *In re Sullivan,* 33 Ill. 2d 548 (1965), three year suspension. Since disciplinary proceedings were, prior to 1967, considered "civil," there was no "double jeopardy" involved. But now that *Spevack* v. *Klein,* 385 U.S. 511 (1967), has determined that depriving a person of a license which is the means of earning a livelihood constitutes the imposition of a "penalty," the disciplinary proceeding resulting in a suspension involves additional punishment (that is, a second "penalty") for the same tax evasion for which the defendant has already paid a penalty in the criminal conviction. This constitutes "double jeopardy" prohibited by the Fifth Amendment to the Constitution of the United States.

Formerly, it was held that where the same act constitutes a violation of State and Federal law, two prosecutions may be had without violating the double jeopardy principal (21 Am. Jur. 2d, Criminal Law § 192). Now that the "double jeopardy" prohibition of the Fifth Amendment is applicable to State as well as to Federal prosecutions, double punishment for the same act is abhorrent to the constitutional protection. Furthermore, the former distinction, which was based on the source of the law involved, is a play on semantics, grossly un-

realistic and violates the true spirit of due process of law. A sovereign should not be allowed to "foreclose the exercise of constitutional rights by mere labels" (*N.A.A.C.P.* v. *Button*, 371 U.S. 415, 429 (1963).

The "source of law" distinction between State and Federal origin has already been rejected by the Supreme Court of the United States in *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U.S. 52 (1964). In *Murphy*, persons had been subpoenaed to testify at a hearing conducted by the Waterfront Commission. Although they were granted immunity from prosecution under State laws, they refused to testify "on the ground that the answers might tend to incriminate them under *federal* law, to which the grant of immunity did not purport to extend" (378 U.S. at 54). The Supreme Court of the United States reversed prior rulings on this point and said: "We hold that the constitutional privilege against self-incrmination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law." (378 U.S. at 77-78). "[We] hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him." (378 U.S. at 79).

It is of interest to note that in disciplinary proceedings based on a federal conviction, the respondent is not allowed in Illinois, to contradict the purported facts upon which the federal conviction is based, as "The record of conviction of respondent is conclusive of his guilt and it has been established in this State that we cannot go behind such rec-

ord." *In re Teitlebaum,* 13 Ill. 2d 586, 590 (1965). In the disciplinary proceeding, the respondent is limited, in Illinois, to the introduction of "facts and circumstances in aggravation or mitigation of each case in an effort to determine an appropriate penalty." *In re Sullivan,* 33 Ill. 2d 548, 554 (1966). In the opinion in the case at bar, the Supreme Court of Illinois stresses the proposition that the federal income tax "conviction" is "conclusive evidence of guilt; and that such conviction *per se* justifies disciplinary action" and that the court is limited "to consider the facts and circumstances in aggravation or mitigation in each case in determining the penalty to be imposed." Thus, the accused lawyer is deprived of an opportunity to prove himself not guilty in the State proceeding, but is nevertheless subjected to a second "punishment" (See *In re Ruffalo,* 390 U.S. 544, 550, 551 (1968), quoted from at page 13, *ante*).

In 1963-1964, Nathan Shavin was, in a very realistic sense, suspended from the practice of law for one year (while he was incarcerated in the Federal penitentiary) for something which he had purportedly done in 1954-1955—nine or ten years previously. In 1968 he is ordered by the Supreme Court of Illinois to be suspended again from the practice of law for two years for the same offense which he had purportedly committed in 1954-1955—thirteen years previously. If the lapse of time is intended as a "cure," the time has long passed. If it is intended as a second punishment for the same act, it constitutes double jeopardy and violates the true spirit of due process of law.

The basic distinction between disbarment, on the one hand, and suspension, on the other hand, must not be overlooked. While disbarment may be necessary to remove an incompetent person from the practice of law, suspension is, in its very essence and per se, punitive in nature. Its objective is, like all punishment, to operate as a deterrent or as a retaliation.

As shown above, the judgment of the Supreme Court of Illinois violates the Fifth Amendment to the Constitution of the United States prohibiting double jeopardy.

Article VI of the Constitution of the United States provides: "This Constitution, and the laws of the United States * * * shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding."

CONCLUSION

For the above and foregoing reasons, the petitioner prays that a writ of certiorari issue from this Court to review the judgment of the Supreme Court of Illinois in this case.

Respectfully submitted,

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